

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA

v.

HAROLD L. ANDERSON,

Defendant

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Criminal No. 90-00020-P

RECOMMENDED DECISION ON MOTION TO SUPPRESS

On March 21, 1990 the Grand Jury indicted the defendant for attempted extortion in violation of 18 U.S.C. ' ' 1951 and 2. The defendant has filed a motion to suppress items seized from his person on March 19, 1990 and from his automobile on March 22, 1990.¹ An evidentiary hearing was held before me on May 16, 1990. I recommend that the following findings of fact be adopted and that the motion to suppress be ***DENIED***.

Proposed Findings of Fact

During the evening of March 15, 1990 Duane D. Fitzgerald, President of Bath Iron Works Corporation ("BIW"), received an anonymous telephone call at home indicating that there was a package at his front door. Upon opening the door Fitzgerald discovered an envelope addressed to William E. Haggett, Chairman of the Board of BIW, ``or" himself. See Govt. Exh. 1. The envelope contained a handwritten note demanding the payment of \$5 million in \$100 bills and indicating that

¹ The seizure of items from the defendant's vehicle was made pursuant to a search warrant issued by me on March 20, 1990.

``[i]f anything goes wrong" information potentially damaging to BIW would be transmitted to ``certain parties." *Id.* Attached to the note were copies of internal memoranda of BIW, annotated and highlighted to point out the assertedly damaging information. *Id.* The note also instructed the addressee to be in his office at 9:45 p.m. on March 19, 1990 to receive a call indicating the time and place to drop off the money. At approximately 10:00 p.m. the same evening Fitzgerald called Max Dawson, Chief of the Bath Police Department, and informed him of the foregoing.

Following Fitzgerald's call, Chief Dawson attended a meeting of senior managers at BIW. During the meeting Chief Dawson obtained the envelope and its contents. Chief Dawson asked those assembled for their thoughts as to who might have sent the demand note and why. The defendant, a BIW employee, was identified as their main suspect. Pat O'Keefe, Vice President of Quality Assurance, explained to Chief Dawson, and later to FBI Special Agent Gerald T. Mahoney, that approximately a year earlier, in March, 1989, the defendant had requested a meeting with Fitzgerald and at the meeting indicated that he had discovered that certain welding parameters used by BIW in its shipbuilding work were faulty and that he wanted to bring that to BIW's attention. He also asked for a promotion to a management position. Shortly after that meeting began, Fitzgerald asked O'Keefe to join the meeting so he could be aware of the defendant's allegations. The defendant had apparently prepared a handwritten memorandum which he had used as part of his presentation. At the meeting and in his memorandum the defendant identified by number specific hulls on which he asserted faulty welding parameters had been used. Fitzgerald and O'Keefe provided Chief Dawson with a copy of the memorandum. *See* Govt. Exh. 3. The specific hull numbers recited in the demand note and accompanying materials are also listed in the March, 1989 memorandum. *Compare* Govt. Exh. 1 *with* Govt. Exh. 3. BIW also provided law enforcement authorities with a copy of an April 7, 1989 memorandum from O'Keefe to Fitzgerald summarizing a meeting O'Keefe had with the defendant that

day. *See* Govt. Exh. 2. Specifically, the memorandum indicates that the defendant informed O'Keefe that, although pleased with his new work assignment, he felt his salary increase was inadequate. *Id.* At the meeting the defendant obliquely threatened to expose the faulty welding parameters to the public and company owners if his salary demands were not satisfied. *Id.* As part of its investigation the FBI inquired whether any similar complaints concerning faulty welding parameters and hull numbers had been received. BIW authorities indicated that there had not been.

In preparation for the anticipated telephone call, Chief Dawson and Agent Mahoney made arrangements with the security department of New England Telephone Co. for the telephone company to establish tracing procedures which would allow it to identify the origin of any calls coming into BIW on March 19 at approximately 9:45 p.m. A tape recorder was also set up on the telephone which was to be used at BIW. BIW welding department foreman Larry Buckowski, who had previously indicated that he had had extended conversations with the defendant during the course of their employment, was asked to be present when the phone call came into BIW in order to determine whether he recognized the caller's voice as that of the defendant. Agent Mahoney also determined from Maine motor vehicle records the registration number of the defendant's car and its description -- a dark gray Plymouth Voyager van. In addition, Agent Mahoney, Chief Dawson and several other officers examined and compared the handwriting of the defendant's March, 1989 memorandum to BIW (Govt. Exh. 3) with that of the demand note and accompanying materials (Govt. Exh. 1) and determined that the same person had written both.²

² The style of writing found in all of these documents reflects several distinguishing characteristics which would allow the average untrained observer to notice a definite similarity. Agent Mahoney testified that he observed that the top line of the capital ``T's" extends over other letters and that the capital ``B's" were very unique. He also observed a tendency for misspelling in both sets of documents.

On the evening of March 19, Haggett, Buckowski and Agent Mahoney, among others, were present in Haggett's office at the time of the anticipated call. At 9:46 p.m. the call came through and was routed to Haggett's phone. Buckowski, then in an adjacent office, and Haggett picked up telephones simultaneously so that Buckowski could listen in on the conversation. In a brief and barely audible message the caller instructed Haggett to take Route 209 south to the Phippsburg Center Store. When the call was concluded Buckowski tentatively identified the caller as the defendant.³ Agent Mahoney then contacted New England Telephone and was told by a phone company security officer that the phone call had originated in the Phippsburg exchange but that, because of the nature of the telephone equipment servicing that exchange, it was not possible to determine a more exact location. The 9:46 p.m. call from Phippsburg was the only one placed to BIW at that time.

Earlier in the day a command post had been established at Bath City Hall. After receiving the 9:46 p.m. call Agent Mahoney spoke to Chief Dawson who was at the command post, told him the call had originated in the Phippsburg exchange and indicated that waiting vehicles should be immediately dispatched. Between five and nine unmarked police cars were sent toward Phippsburg center. Phippsburg is located on a peninsula that is situated south of Bath; the only access to the village is via Route 209. At a meeting earlier that day all of the officers involved in the surveillance operation were made aware of the defendant's vehicle description and registration number and each of them was furnished with a photocopy of the defendant's photograph taken from BIW records.

Agent Mahoney proceeded with FBI Special Agent Mercer and Chief Dawson in Chief Dawson's vehicle south on Route 209 toward Phippsburg. When they were approximately one mile north of the Phippsburg Center Store they spotted a dark colored van driving at a high rate of speed

³ Buckowski stated that he believed the caller was the defendant, but could not be certain.

away from Phippsburg center north toward Bath. Chief Dawson radioed police officer James Fisher, who was driving a marked Bath police cruiser, and instructed him to pull up behind the van and try to identify it by its registration number, pulling it over if necessary. Officer Fisher subsequently radioed that he had the vehicle in sight and was pulling it over. Shortly thereafter he read out the vehicle's registration number. Agent Mahoney reviewed his own notes and determined that the number matched that of the vehicle registered to the defendant. Chief Dawson then instructed Officer Fisher to detain the driver until he and the FBI agents arrived. At this point the van was in Bath one or two miles north of the Phippsburg Center Store.

A few seconds after Officer Fisher stopped the van Bath Police Detective Peter Lizanecz and FBI Special Agent Harrington, who had been traveling together, also south on Route 209, and had turned to follow the van, pulled their unmarked police car in front of the van. Lizanecz exited the car and stood near the rear fender with his gun drawn while Officer Fisher approached the driver's side window of the stopped van and asked the driver, whom Detective Lizanecz recognized to be the defendant, for his license and registration. Moments later Officer Fisher asked the defendant to step out of his vehicle and place his hands on its roof. He then signalled to Detective Lizanecz that everything was okay. Detective Lizanecz then holstered his gun, approached the defendant and began to pat him down for weapons. In the meantime, FBI Special Agent Burke had approached the defendant's position from his car which by this time was also parked in front of the defendant's van. During an early stage of the pat-down Officer Fisher informed Agent Burke and Detective Lizanecz that the defendant had a knife. At that point the defendant brought his left hand down to his side whereupon Agent Burke immediately placed it back on the car roof and ordered him to keep it there. Agent Burke then noticed a bulge in the defendant's left jacket pocket and, thinking it might contain

the knife, reached into the pocket and withdrew a handful of articles. As he did so a piece of paper fell to the ground. Agent Burke picked it up and examined it. It appeared to be a small handwritten map of the area. Agent Burke showed the paper to Detective Lizanecz and then replaced it, along with the other items, in the defendant's pocket. Agent Burke testified that, because the defendant was in custody and was going to be watched, he felt there was no danger in replacing the evidence in the defendant's pocket. By this time Detective Lizanecz had found the knife in a sheath attached to the defendant's belt. The defendant was then handcuffed by Detective Lizanecz, placed under arrest and soon thereafter taken to the Bath police station.

When Agent Mahoney and Chief Dawson ordered the stop of the defendant's vehicle, Agent Mahoney had knowledge of the fact that BIW manufactures ships for use in interstate and foreign commerce, that steel used in the manufacturing process is shipped to Maine from out of state and that payments by BIW to its suppliers and from the government to BIW are sent by U.S. Mail and across state lines.

Legal Discussion

The defendant's legal position was articulated by his counsel at the conclusion of the hearing. He does not argue an absence of probable cause to believe that the offense of attempted extortion of BIW has been committed. Rather, he asserts that at the time he was pulled over the authorities were lacking probable cause to believe that he committed the offense and therefore had no basis for arresting him. Although he does not question the justification for effecting a *Terry*-stop, he claims that the law enforcement officer who removed several items from his jacket pocket, including the small handwritten map which fell to the ground and which the officer examined, exceeded permissible limits of a *Terry*-stop pat-down because he had no reason to believe that any of those items was a weapon.

The defendant suggests that the map supplied the missing element necessary to establish probable cause for arrest. He concludes, therefore, that the arrest was unlawful and that any incriminating evidence obtained thereafter must be suppressed as the fruits of an illegal search. The government contends that it had full probable cause to arrest the defendant when he was stopped. The defendant concedes that if there was probable cause to arrest him at the time the stop order was given his motion necessarily fails in its entirety.

The Court of Appeals for the First Circuit has recently defined probable cause as follows:

Probable cause to make an arrest exists where the facts and circumstances of which the arresting officer has knowledge would be sufficient to permit a reasonably prudent person, or one of reasonable caution, to conclude that an offense has been, will be, or is being, committed. Furthermore, the quantum of evidence necessary to support probable cause must satisfy only this objective standard and is not required to rise to the level of that needed to sustain a conviction.

United States v. Cruz Jimenez, 894 F.2d 1, 4 (1st Cir. 1990) (citations omitted). As the Supreme Court has said, "only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause." *Spinelli v. United States*, 393 U.S. 410, 419 (1969). See also *Illinois v. Gates*, 462 U.S. 213, 231 (1983) ("Perhaps the central teaching of our decisions bearing on the probable-cause standard is that it is a 'practical, nontechnical conception.' *Brinegar v. United States*, 338 U.S. 160, 176 (1949). 'In dealing with probable cause, . . . as the very name implies, we deal with probabilities. . . .' *Id.*, at 175.").

The probabilities of this case clearly favor the government's position. Prior to stopping the defendant the authorities had gathered substantial information linking him to the offense. The demand note and accompanying materials made specific reference to welding parameter deficiencies involving certain ship hulls. Senior management personnel at BIW were aware that the defendant had a year earlier registered an identical complaint which included specification of the same hulls. Seeds of

the defendant's seeming propensity for extortionate behavior were apparently sown then as evidenced by the threatening manner in which he initially raised the faulty parameter issue and followed it up. Originally he sought a promotion to a management position. Soon after, in a meeting with Pat O'Keefe, BIW's Vice-President of Quality Assurance, he implied that, unless his demand for a further salary increase was satisfied, he would take some action concerning the faulty parameter issue which would embarrass the company or at least senior management. A comparison of the handwritten demand note and annotations on the enclosed materials with the March, 1989 memorandum the defendant wrote and presented to company president Duane Fitzgerald reveals similarities so obvious that a reasonably prudent person without special handwriting analysis training could conclude that the writings are those of the same individual. In addition, welding department foreman Larry Buckowski was able to tentatively identify as the defendant the individual who, consistent with the demand note, placed the call to Fitzgerald on March 19, 1990 at 9:46 p.m. Finally, the defendant's vehicle was observed by FBI Agent Mahoney and Chief Dawson, the officials who issued the stop order, soon after the call was made about one mile north of the Phippsburg Center Store, the location to which the caller directed BIW chairman William Haggett for the apparent purpose of delivering the ransom money. Once identification of the defendant was made, he was patted down and arrested.

Applying the nontechnical, totality-of-the-circumstances concept adopted in *Gates*, I conclude that the information which the arresting officers had when the defendant's vehicle was stopped was sufficient to permit a reasonably prudent person to conclude that the defendant had committed the offense of attempted extortion. Accordingly, I recommend that the defendant's motion to suppress be **DENIED.**

NOTICE

A party may file objections to those specified portions of a magistrate's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 5th day of June, 1990.

*David M. Cohen
United States Magistrate*